STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2014
v	No. 309807 Genesee Circuit Court
AVERN LEE BURNSIDE, Defendant-Appellant.	LC No. 09-025749-FC

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant, Avern Lee Burnside, appeals as of right from his jury trial convictions of assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227(2), felon in possession of a firearm, MCL 750.224f, discharging a weapon from a vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for the assault with intent to murder conviction, two years' imprisonment for the felony-firearm conviction, and 2-1/2 to 15 years' imprisonment for each of the remaining three convictions. We affirm.

The prosecution presented evidence at trial to establish that at approximately 12:30 p.m. on July 30, 2009, defendant was driving a black SUV on Court Street in Flint, Michigan while physically assaulting his girlfriend, Leah Watson, who was sitting in the front passenger seat. Antwyne Ledesma was driving on the same road and witnessed defendant's conduct. When the two cars pulled up to a red light, Ledesma, whose windows were down, yelled "leave her alone; you're not f***in' right." Meanwhile, Watson was screaming, hollering, and asking for help. When the light turned green, instead of turning left, as he was in the left turn lane to do, defendant continued on Court Street and followed Ledesma. Defendant pulled alongside Ledesma's car and fired two shots at her. Ledesma's car was struck by one bullet, but she escaped uninjured.

I. SERGEANT BROWN'S TESTIMONY

In his first brief on appeal,[1] defendant argues that the trial court abused its discretion in allowing Sergeant Mitch Brown to give his opinion on the behavior of domestic violence victims and to testify that Leah Watson was a "classic case" of a domestic violence victim. We agree that the trial court abused its discretion, but conclude that the error was harmless.

We review the trial court's decision on a preserved evidentiary issue for an abuse of discretion. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). This Court also reviews a trial court's decision to admit or exclude expert witness testimony, and a trial court's decision on an expert's qualifications, for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Mahone*, 294 Mich App at 212.

Under MRE 701, a lay witness can provide opinion testimony that is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 702 addresses expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"[W]hether expert testimony is beyond the ken of common knowledge is a commonsense inquiry that focuses on whether the proposed expert testimony is on a matter that would be commonly understood by the average person." *People v Kowalski*, 492 Mich 106, 123; 821 NW2d 14 (2012). Expert testimony may allow the jury to "intelligently evaluate" a foreign experience in cases where "certain groups of people are known to exhibit types of behavior that are contrary to common sense and are not within the average person's understanding of human behavior." *Id.* at 124. For example, expert testimony can be used to help the jury understand the behavior of a child who has been the victim of sexual abuse, or the actions of a domestic violence victim. *Id.*; *People v Peterson*, 450 Mich 349, 375-377; 537 NW2d 857 (1995); *People v Christel*, 449 Mich 578, 591-596; 537 NW2d 194 (1995).

In *Christel*, 449 Mich at 592, our Supreme Court stated that expert testimony may be needed to explain why "a complainant endures prolonged toleration of physical abuse and then attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or

[1] After defendant's first appellate counsel withdrew, this Court granted new counsel leave to file a supplemental brief. See *People v Burnside*, unpublished order of the Court of Appeals, entered September 25, 2013 (Docket No. 309807). In addition, defendant filed a Standard 4 brief.

friends, or denies or recants the claim of abuse." The Supreme Court held that such expert testimony is only admissible when "it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified." *Id.* at 580. Even then, an expert "may not opine whether the complainant is a battered woman, may not testify that defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness." *Id.* at 580.

In the case at bar, Sergeant Brown testified:

> In my experience . . . this would be a classic case of somebody that was involved in domestic violence. Initially, make the report, is scared to death. And then try to stick up or change the complaint or go back, so that – almost feeling like they were the perpetrator by getting this person in trouble because this person had assaulted them or had done something. I would, you know, again say this would be a classic case of somebody that was a victim of domestic violence.

The trial court abused its discretion in allowing Sergeant Brown to testify as a lay witness about the behavior of domestic violence victims. Sergeant Brown was not qualified as an expert in the area of battered woman syndrome or domestic violence, and only a properly qualified expert may testify on these subjects. See *Christel*, 449 Mich at 579-580. Other than briefly saying that he had prior experience with domestic violence victims, Sergeant Brown did not demonstrate "knowledge, skill, experience, training, or education" from which he could form an opinion on the behavior of domestic violence victims. See MRE 702. Yet, despite not being qualified as an expert, Sergeant Brown provided testimony that would ordinarily be within the realm of expert testimony. Indeed, his testimony was meant to explain Watson's behavior because it was "contrary to common sense" and "not within the average person's understanding of human behavior." See *Kowalski*, 492 Mich at 124. This behavior included avoiding a subpoena to testify, inculpating defendant in her preliminary examination testimony, and then writing a letter to recant that testimony. Sergeant Brown testified that domestic violence victims often make a report and then try to recant it because they feel like the perpetrator. However, only a properly qualified expert can testify on matters "beyond the ken of common knowledge." *Id.* at 123. See also *Peterson*, 450 Mich at 375-377.

Furthermore, even qualified experts "may not opine whether the complainant is a battered woman, may not testify that defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness." *Christel*, 449 Mich at 580. Sergeant Brown opined that Watson was a domestic violence victim, or battered woman, when he testified that this was "a classic case of somebody that was a victim of domestic violence." Thus, his testimony was inadmissible. *Id.*

Nonetheless, reversal is not required because the error did not result in a miscarriage of justice. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an

> examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In determining if the error resulted in a miscarriage of justice, this Court asks whether "it is more probable than not that a different outcome would have resulted" absent the error. *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010) (internal quotation marks omitted). Defendant has the burden of proving that the error was outcome determinative, or resulted in a miscarriage of justice. *Id.*

Sergeant Brown's testimony regarding the behavior of domestic violence victims was intended to explain why Watson's actions and statements were so inconsistent. This evidence was cumulative to properly admitted evidence because Watson herself explained why she changed her story. Watson testified that defendant verbally, emotionally, and physically abused her. She said that she did not tell Sergeant Brown the truth at first because she was scared of defendant and she did not want to get him in trouble. After Watson testified at defendant's preliminary examination, he told her she was ruining his life and everything was her fault. Watson then wrote a letter recanting her testimony. Watson testified that at that time, she would have done anything necessary to keep defendant from going to jail.

Moreover, the error was not outcome determinative because the evidence of defendant's guilt was compelling. Telephone calls between Watson and defendant while defendant was incarcerated corroborated Watson's explanation for her inconsistent actions and further implicated defendant. During one conversation, defendant told Watson to avoid getting subpoenaed because if she went to court, Ledesma would probably recognize her. When Watson did get subpoenaed, defendant was not happy with her. This evidence supports Watson's testimony that she lied because defendant told her to and she was afraid of him. It is also evidence of defendant's guilt and his plans to cover up his crime and avoid conviction. During another conversation, defendant told Watson, "last time I checked, if it weren't for arguing with your mother-f*****' a**, s*** wouldn't even be like this." This is also evidence of an abusive relationship, which corroborates Watson's testimony, and an implied admission of guilt by defendant. Given the evidence that explains Watson's inconsistent behavior and incriminates defendant, the erroneous admission of Sergeant Brown's opinion testimony was not outcome determinative. See MCL 769.26; *Gursky*, 486 Mich at 619.

II. PROSECUTORIAL MISCONDUCT

Defendant also contends in his first brief that the prosecutor's misconduct denied him a fair trial. We disagree.

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to any of the alleged prosecutorial misconduct below. Therefore, this issue is unpreserved.

Generally, this Court reviews claims of prosecutorial misconduct de novo "to determine whether the defendant was denied a fair trial." *People v Dunigan*, 299 Mich App 579, 588; 831

NW2d 243 (2013). When a claim of prosecutorial misconduct was not preserved, this Court reviews for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011) (quotation omitted).

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Meissner*, 294 Mich App at 456, citing *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Under a plain error analysis, reversal for prosecutorial misconduct is not required "where a curative instruction could have alleviated any prejudicial effect." *Unger*, 278 Mich App at 235. "[P]roper jury instructions cure most errors because jurors are presumed to follow the trial judge's instructions." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

Defendant argues that the prosecutor's opening statement was argumentative. He points to these sections of the prosecutor's opening statement, among others:

> Intent. Think about intent. Had a gun. Pulled the gun out. Wasn't supposed to have a gun. Takes the gun and shoots at somebody he doesn't even know, in the car right next to her.
>
> * * *
>
> Just because the Defendant was a bad shot and didn't hit her doesn't mean he didn't mean to kill her.
>
> * * *
>
> Think about shooting into a car with somebody driving right next to you. Why would you do that if you didn't mean to kill 'em?

In her opening statement, a prosecutor is allowed to state facts that she intends to prove at trial. *Meissner*, 294 Mich App at 456; *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). In this case, the statements cited above were all supported by the evidence produced at trial. Ledesma testified that defendant was driving in the lane next to her. She saw him raise his arm and then she heard a gunshot. Watson testified that defendant reached across her and fired at Ledesma's car, which was right next to them. Thus, defendant's claim is meritless. In addition, the prosecutor's opening remarks were not excessively inflammatory, and the prejudice, if any, that resulted from them could have been cured by an instruction. See *Mesik (On Reconsideration)*, 285 Mich App at 542; *Unger*, 278 Mich App at 235. In fact, the trial court specifically instructed the jury that the attorneys' opening statements were not evidence. The court also told the jurors that they must only consider the evidence admitted at trial when deciding the case.

Defendant also argues that the prosecutor improperly vouched for Watson's credibility. During her opening statement, the prosecutor said the following about Watson's appearance at the preliminary examination:

> So, she appeared. She told the truth; it was Avern Burnside in that vehicle. It was Avern Burnside who was hitting me. Avern Burnside who shot at the woman.

It is improper for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Meissner*, 294 Mich App at 456 (quotation omitted). The prosecutor's statement in this case did not indicate that she had special knowledge concerning Watson's truthfulness. In addition, the comment was isolated and made in the context of explaining Watson's inconsistent behavior and statements. During this explanation, the prosecutor made it clear that she was summarizing what she expected Watson to say during her testimony:

> She'll tell you that she didn't want to go to court. . . . She'll tell you that she tried [to] avoid getting served so she wouldn't have to go to court. . . . Ms. Watson will also tell you that after the preliminary exam she wrote a letter, and she'll read it to you. She wrote a letter saying everything I said wasn't true at that exam. The police and prosecutor made me do it. She'll tell you why she did that.

Consequently, we find that the prosecutor's comments were not improper. In addition, an instruction could have cured the prejudice, if any, caused by her statements. See *Mesik (On Reconsideration)*, 285 Mich App at 542; *Unger*, 278 Mich App at 235.

Finally, defendant argues that the prosecutor elicited improper opinion testimony from Sergeant Brown. During the prosecutor's direct examination, Sergeant Brown testified:

> *Q.* Have you ever shot at a moving vehicle before?
>
> *A.* One time.
>
> *Q.* Why were you shooting at a moving vehicle[?]
>
> *A.* It was an incident when I was working here in April of 1995, an armed robbery. . . . I exited my vehicle and shot at the person trying to stop them.
>
> *Q.* Did you hit him?
>
> *A.* No, I didn't.
>
> *Q.* Did you mean to?
>
> *A.* I was trying to stop him. Yes, I was trying to shoot him.
>
> *Q.* Did you mean to kill him?
>
> *A.* If he was killed as a result of it, yes, I was trying to stop him.

Sergeant Brown's testimony was not relevant to a fact at issue. Sergeant Brown's intent when he shot at a vehicle had no bearing on defendant's intent when he shot at Ledesma's vehicle. It was improper for the prosecutor to solicit such testimony. Nonetheless, reversal is

not required because if defense counsel had objected, an instruction would have cured the error. See *Unger*, 278 Mich App at 235. Moreover, reversal is not required because, as discussed *supra*, evidence of defendant's guilt was compelling.

Defendant contends that the cumulative effect of all of the alleged instances of prosecutorial misconduct deprived him of a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Reversal is only warranted, however, if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id*. Here, the only improper conduct by the prosecutor was to solicit intent testimony from Sergeant Brown, which we conclude could have been cured by way of a jury instruction.

III. OTHER ACTS EVIDENCE

In his second brief and Standard 4 brief, defendant claims that the trial court abused its discretion in allowing the prosecutor to present prior bad acts evidence under MRE 404(b). The prior incident occurred in 2005 when defendant allegedly fired a shot at Watson while she was driving away from him after the two had argued. We agree that the trial court abused its discretion in admitting this evidence, but conclude that reversal is not required because the error did not result in a miscarriage of justice.

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009), citing *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The trial court abuses its discretion when "it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id.* at 670. When an evidentiary question involves the interpretation of law, like whether evidence is precluded by a statute or court rule, appellate review is de novo. *People v Buie*, 298 Mich App 50, 71; 825 NW2d 361 (2012).

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible for other reasons, like to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b)(1).

When the prosecution seeks to admit evidence under MRE 404(b), it must first "offer the 'prior bad acts' evidence under something other than a character or propensity theory." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the prosecution must demonstrate that the evidence is relevant to a material fact, as required by MRE 401 and MRE 402, for a purpose other than showing the defendant's character or criminal propensity. *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). "Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403." *Waclawski*, 286 Mich App at 671, quoting *Knox*, 469 Mich at 509. If the prosecution satisfies these requirements, the defendant can request a limiting instruction pursuant to MRE 105 that directs the jury to consider the evidence only for noncharacter purposes. *Mardlin*, 487 Mich at 616. MRE 404(b) is an inclusionary rule of evidence. *Id.* at 616. "Evidence is *inadmissible* under this rule *only* if it is

relevant *solely* to the defendant's character or criminal propensity." *Id.* at 615-616 (emphasis in original).

Although the prosecution recited a proper purpose, i.e., establishing defendant's intent, the trial court abused its discretion in admitting the evidence because the prior acts evidence was not probative of defendant's intent when he shot at Ledesma's car. *Crawford*, 458 Mich at 387. ("Mechanical recitation of knowledge, intent, absence of mistake, etc., without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)."). To be probative, evidence must "make the existence of any fact that is of consequence to the determination of the act more probable or less probable than it would be without the evidence." MRE 401. See also *Crawford*, 458 Mich at 389-390. With respect to 404(b) evidence, the proffered evidence must be probative of something other than the defendant's character or propensity to commit the crime. *Id.* at 390.

Prior bad acts evidence can be relevant to prove a defendant's intent when the defendant is claiming innocent intent, inadvertence, or mistake. See, e.g., *Mardlin*, 487 Mich at 629; *People v VanderVliet*, 444 Mich 52, 75-81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In the instant case, however, defendant did not claim that he accidently shot at Ledesma's car. Rather, he claimed that even if he was the shooter (which he also denies), he did not have the intent to kill that is necessary to support a conviction of assault with intent to kill. Evidence of the 2005 shooting is not probative of this issue in part because there was no indication, based on the facts provided, that defendant intended to kill Watson when he shot at her car in 2005. Even if provided, such evidence would not support the inference that defendant had the specific intent to murder. Rather, this evidence is only relevant to show defendant's character, or his propensity to lose his temper, carry a gun, or shoot at someone's vehicle when he is angry. Evidence is not admissible when it is only relevant to show "defendant's inclination to wrongdoing in general." *VanderVliet*, 444 Mich at 63. Such character evidence encourages the jury to focus on the type of person defendant is, and to conclude that he is the type to commit the crime with which he is charged. *Id*. This leads to "a substantial danger that the jury will overestimate the probative value of the evidence." *Id.* at 63-64.

Although the trial court abused its discretion in allowing evidence of the 2005 shooting, this error was harmless. If bad acts evidence is erroneously admitted, the "defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). In other words, reversal is not required unless it is more probable than not that the error was outcome determinative. *Id*.

Here, although evidence of the 2005 shooting was improper character evidence, the jury properly heard evidence of defendant's character throughout the trial. For example, Watson testified that defendant verbally, emotionally, and physically abused her. She said that on July 30, 2009, she and defendant were having an argument and defendant grabbed her hair and tried to slam her head against the dashboard. Ledesma corroborated Watson's testimony and said that she saw a black man assaulting a white woman in an SUV, which police subsequently learned was registered to Watson. The jury also heard evidence of defendant's character from the telephone conversations Watson and defendant had while he was in jail. For example, defendant attempted to protect himself by telling Watson to avoid getting subpoenaed, and by asking

Watson to lie for him. Furthermore, the evidence of defendant's guilt was significant, and it is unlikely that the jury found defendant guilty because he committed a somewhat similar act in 2005. Ledesma testified that she saw the driver of the SUV raise his hand and then she heard a gunshot. Watson testified that defendant reached across her and fired two shots. The similarities between Watson's and Ledesma's accounts bolstered the credibility of both these witnesses. In addition to these corroborated accounts, the phone calls between Watson and defendant while he was in jail were further proof of defendant's guilt. The phone calls demonstrate that defendant was trying to cover up his involvement in the shooting. He encouraged Watson to avoid being subpoenaed, to lie about what happened, and to refuse to speak to the police. In another phone call, defendant told Watson that he would not be in trouble if he had not argued with her. Consequently, we find that defendant is not entitled to relief.

IV. SPEEDY TRIAL

In his Standard 4 brief, defendant argues that he was denied his right to a speedy trial. We disagree.

"A defendant must make a formal demand on the record to preserve a speedy trial issue for appeal." *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999) (quotation omitted). During several pretrial hearings, defense counsel noted that the case was substantially delayed and told the court that defendant wanted to go to trial soon. However, defendant never made a formal demand for a speedy trial or requested dismissal on this basis, and the trial court never ruled on this issue. Therefore, this issue is unpreserved. *Id.*

"The determination whether a defendant was denied a speedy trial is a mixed question of fact and law." *Waclawski*, 286 Mich App at 664. We review the trial court's factual findings for clear error and questions of law de novo. *Id*. However, "[u]npreserved, constitutional errors are reviewed for plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006).

A defendant has the right to a speedy trial under both the United States Constitution and the Michigan Constitution. US Const, Am VI; Const 1963, art 1, § 20; *Waclawski*, 286 Mich App at 665. To determine if a defendant has been denied his right to a speedy trial, we consider four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013) (quotation omitted); see also *Vermont v Brillon*, 556 US 81, 90; 129 S Ct 1283; 173 L Ed 2d 231 (2009). When the delay is more than 18 months, prejudice is presumed and the prosecution has the burden of showing that the defendant was not prejudiced. *People v Williams*, 475 Mich 245, 262; 716 NW2d 208 (2006).

Defendant was arraigned on November 2, 2009. His trial began on February 22, 2012, about 27 months later. Thus, the first factor – the length of delay – weighs in defendant's favor. Because a delay of more than 18 months is presumptively prejudicial, this Court must consider the remaining factors. See *id.*; *Waclawski*, 286 Mich App at 666.

The second factor – the reason for delay – weighs against defendant. When considering this factor, the court must determine if "each period of delay is attributable to the defendant or

the prosecution." *Waclawski*, 286 Mich App at 666. When delays are unexplained, they are attributed to the prosecution. *Id.* "Although delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id.*, quoting *Williams*, 475 Mich at 263.

As defendant argues, the primary reason for the delay before his trial began can be attributed to the time needed to transcribe the jail phone call recordings between defendant and Watson. The transcripts were not completed and delivered to the parties until sometime around May 31, 2011. However, the time it took to transcribe the phone recordings should be given "a neutral tint" and "assigned only minimal weight." See *Waclawski*, 286 Mich App at 666.

In addition, the record shows that it was defense counsel who requested that the recordings be transcribed. Delays caused by defendant or defense counsel are generally attributable to defendant. *Brillon*, 556 US at 90-91. At a pretrial hearing on May 17, 2010, defense counsel said:

> One of the problems, Judge, I've got – basically I was handed two CDs with these telephone conversations. The only way my client can hear these is if I'm there with a computer, at the jail with a computer, because my client is in the jail obviously.
>
> So, my client would like a transcript of what's contained in the tapes so we can go through them and adequately prepare for trial.

When the transcripts were still not completed by April 18, 2011, the court asked whether defense counsel still considered the transcripts necessary to his defense. Defense counsel answered affirmatively, stating that he and defendant had to know what was said in the recordings before they could go to trial. However, the record shows that defense counsel had CDs of the recordings for almost a year at this point. He and defendant could have listened to the recordings.

Other delays were also attributable to defendant. On August 3, 2011, defense counsel asked the court to order a competency evaluation for defendant. The court granted the request. The results of the competency evaluation were not received until sometime around November 14, 2011.[2]

On November 1, 2011, defendant, acting in propria persona, filed a complaint for superintending control in this Court. Defendant called the document a complaint for "mandamus." This Court denied defendant's complaint for superintending control. *Burnside v Genesee Circuit Judge*, unpublished order of the Court of Appeals, entered January 27, 2012 (Docket No. 306913). While defendant's action was pending in this Court, he asked the trial

[2] Defendant was found competent to stand trial.

court to delay trial until this Court reached a decision. The trial court agreed to do so and set the trial for January of 2012.

On December 19, 2011, defense counseled relayed defendant's request to have the swearing out of the warrant transcribed. The court agreed to order the proceeding transcribed. The transcript was filed on January 9, 2012. Thus, defendant's request for this transcript caused further delay. Overall, defendant's own actions caused nearly all of the delays in this case, and we find that the second factor weighs against defendant. *Brillon*, 556 US at 90-91.

The third factor – defendant's assertion of his right to a fair trial – also weighs against him. Defendant did not make a formal demand for a speedy trial or file a motion to dismiss on this ground.

Finally, the fourth factor also weighs against defendant because he was not prejudiced by the delay. In his Standard 4 brief, defendant claims that he was prejudiced because the delays caused witness memories to dim. "[S]uch general allegations of prejudice are insufficient to establish that [a defendant] was denied his right to a speedy trial." *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). To support his claim that he was prejudiced by the delay, defendant claims that Watson was unable to remember when she wrote a letter to him in which she allegedly apologized to defendant for her role in defendant's arrest. As a result of Watson's inability to remember the letter, the letter was not admitted at trial. Defendant's claim is meritless. Initially, defendant failed to make an offer of proof at trial concerning the contents of the letter. Thus, he fails to verify his claim as to the contents of the letter, and we need not speculate as to its contents. Moreover, even if defendant's representations of the contents of the letter were true, he ignores the fact that the recorded jail conversations contained similar statements by Watson. Therefore, defendant was not prejudiced.

In conclusion, despite the lengthy delay in this case, the factors weigh against finding that defendant's right to a speedy trial was violated. Defendant has not established plain error affecting his substantial rights.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in both his first appellate brief and his Standard 4 brief that his trial counsel was ineffective. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or a *Ginther*[3] hearing with the trial court. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant did not move for a new trial or a *Ginther* hearing in the trial court. Therefore, our review is limited to mistakes apparent on the record. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *Rodriguez*, 251 Mich App at 38. The circuit court's factual findings are reviewed under a clearly erroneous standard. MCR 2.613(C).

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to establish ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010) (internal citation and quotation marks omitted). See also *Jordan*, 275 Mich App at 667. Generally, a defense attorney has discretion over his method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In his first appellate brief, defendant argues that his trial counsel was ineffective for failing to object to the prosecutor's misconduct. For the reasons discussed above, there was no prosecutorial misconduct with respect to the prosecutor's opening statement or vouching for Watson's credibility. However, it was improper for the prosecutor to elicit opinion testimony from Sergeant Brown about domestic violence victims. Defendant's trial counsel should have objected to this error. Nonetheless, this failure was not outcome determinative. See *Jordan*, 275 Mich App at 667. Additionally, defendant's trial counsel should have objected to Sergeant Brown's testimony about his own experience shooting at a vehicle because such testimony was not relevant to defendant's intent when he shot at Ledesma's vehicle. However, defense counsel's failure to object does not entitle defendant to relief because, as discussed *supra*, defendant was not prejudiced by this testimony. See *id.*

Lastly, defendant claims in his Standard 4 brief that his trial counsel was ineffective for failing to file a motion to dismiss based on the denial of his right to a speedy trial. As discussed above, most of the trial delays were attributable to defendant and he was not prejudiced by the delay. He was not denied his right to a speedy trial. Counsel is not ineffective for failing to make a meritless argument. *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering